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In the Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1300 75

MANDEVILLE ISLAND FARMS, INC., a Corporation, and ROSCOE C. ZUCKERMAN,

Petitioners,

vs.

AMERICAN CRYSTAL SUGAR COMPANY, a Corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Statement of the Case.

The cause of action attempted to be stated in this case centers about a form of sugar beet contract between a California sugar processor on the one hand and two local sugar beet growers on the other, which contract was in use during the crop years 1939, 1940 and 1941. [R. 77, 96, 36-59.] Prior to and *subsequent* to such years the respective contracts in effect between the respondent processor and the petitioning beet growers provided that the latter should be paid for their beets (according to the sugar content thereof) upon the basis of the net return to the processor from sugar manufactured by the latter at its California plant and sold during the particular crop year, final settlement to be made at the close of such year. [R. 89-96.] No complaint is made as to this type of contract. [R. 74-75.]

During the crop years 1939, 1940 and 1941, however, the respective contracts in use provided that the growers

should be paid for their beets upon the basis of the average net sugar return to respondent and to two other sugar processors in business in central California, final settlement again to be made at the close of the particular crop year involved.

Upon this state of facts, plaintiff growers filed this action against defendant processor on July 30, 1945, charging a conspiracy in violation of the anti-trust laws. 15 U. S. C. §15. The District Court granted a motion to dismiss, 64 F. Supp. 265 [R 100-108] and the Circuit Court of Appeals for the Ninth Circuit affirmed. 129 F. (2d) 71. [R. 120-121.] Petitioners' petition for rehearing was denied by the latter court March 27, 1947. [R. 123.]

The holding of both the District Court and the Circuit Court of Appeals was, in substance, that the activities complained of, being local in their nature, did not come within the purview of the Sherman Act, since no effect upon interstate commerce had been shown.

As material to these holdings, it may be pointed out preliminarily, that the contracts were entered into before the beets were grown; that the beets were planted, harvested, delivered to the processor and by it manufactured into sugar wholly within the confines of California; that it was *sugar*, not the beets, which ultimately moved in interstate commerce and was sold in interstate markets; that the sugar was sold before the price to the growers for their beets, whether averaged or not, was finally determined; and that petitioners themselves recognized that the method of determining the price of the beets had no effect upon the price or the marketing conditions of the sugar—the interstate commodity—when they alleged both

in their original and in their amended complaint that the sugar manufacturers "regardless of the price at which sugar was sold from any particular refinery or from any particular manufacturer's refinery or refineries, paid all growers of sugar beets in California north of the 36th parallel, the same price for the same amount of beets of the same sugar content." [R. 11, 76-77.] In a word, nothing was alleged by them to show—indeed the facts just quoted indicate the contrary—that the asserted conspiracy of which they complain operated in any way to fix or to affect the price of the commodity—sugar—which moved in interstate commerce. Compare, for instance, *United States v. Univis Lens Co.*, 316 U. S. 241, 252-253; *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 495-496 and, lastly, *Wickard v. Filburn*, 317 U. S. 111, 125, with its kindred holding that the presence or absence of a *substantial economic effect upon interstate commerce* is the test as to the applicability of the Sherman Act.

Summary of Argument.

I. The cause of action sued upon is a stale claim between private litigants with reference to practices which ceased over five years ago. It presents no question whatever of importance or of public interest such as would warrant a review by this Honorable Court.

II. The decision of the Circuit Court of Appeals is not in conflict either with applicable decisions of this Court or those of the other Circuit Courts of Appeal.

III. The decisions relied upon by petitioners are either based upon regulatory statutes in which Congress has, in order to protect interstate commerce, expressly stated its intention to deal with activities which in isolation are purely local, or are distinguishable on their facts, or both.

ARGUMENT.

I.

The Cause of Action Sued Upon Is a Stale Claim Between Private Litigants With Reference to Practices Which Ceased Over Five Years Ago. It Presents No Question Whatever of Importance or of Public Interest Such as Would Warrant a Review by This Honorable Court.

The record reveals that the conspiracy charged had to do only with the crop years 1939, 1940 and 1941. [R. 74-76; 78-79.] Under the anti-trust laws of California, in so far as any asserted local transgressions were involved, any cause of action in plaintiffs was barred within three years. *California Business and Professions Code*, §§16720-16758; *California Code of Civil Procedure*, §359, pleaded at R. 33, 97. And, but for the wartime moratorium with reference to the anti-trust laws of the United States, the same fate would have befallen their claim in the Federal jurisdiction. 15 U. S. C. §16.

The moratorium in question thus permitted them to enter the Federal court. But even then they failed to show that violation of *public* rights which even a private litigant must show in order to state a cause of action under the Sherman Act. See *Wilder Manufacturing Co. v. Corn Products Co.*, 236 U. S. 165, 174; *Glenn Coal Co. v. Dickinson Fuel Co.*, 4 Cir., 72 F. (2d) 885, 889; *Abouaf v. Spreckels Co.* (N. D. Cal.), 26 F. Supp. 830, 833; *Lynch v. Magnavox Co.*, 9 Cir., 94 F. (2d) 883, 891. These cases all reflect the principle that the Sherman Act was designed to protect the *consuming public*

from monopolies and restraint of trade with reference to commodities passing in interstate commerce; and that the individual cause of action conferred by 15 U. S. C. §15 was but incidental and subordinate to this main purpose. As said in the *Glenn Coal* case (a case which, by the way, is excellent authority for the proposition that most of the allegations of the complaint herein as to the result of the alleged conspiracy are mere conclusions of law):

> "* * * It is well known that the main purpose of the Anti-Trust Act was to protect the public from monopolies and restraint of trade and the individual right of action was but incidental and subordinate. This was well expressed by Mr. Chief Justice White in Wilder Mfg. Co. v. Corn Products Co., 236 U. S. 165, 174, 35 S. Ct. 398, 401, 59 L. Ed. 520, Ann. Cas. 1916A, 118, in the following language:
>
> "'In other words, founded upon broad conceptions of public policy, the prohibitions of the statute were enacted to prevent not the mere injury to an individual which would arise from the doing of the prohibited acts, but the harm to the general public which would be occasioned by the evils which it was contemplated would be prevented, and hence not only the prohibitions of the statute, but the remedies which it provided, were coextensive with such conceptions.'
>
> "Thus, the declaration to be good must show not only damages sustained by the individual plaintiff but even more importantly a violation of public rights prohibited by the Act. It is not sufficient that the declaration shows merely a good cause of action at common law." (72 F. (2d) at p. 889.)

It is obvious, of course, that petitioners made no showing whatever with reference to this important element of their cause of action. There was no consuming public so far as the beets were concerned. The only segment of the public which could have been involved under the facts of this case would have been the consumers of the sugar, for this was the only commodity which reached the public, either through the channels of interstate commerce or otherwise. True, the complaint attempts to set up damage so far as the individual appellants are concerned; but it utterly fails to allege one single fact which would show that the interests of the consuming public were in any way affected. The result is that for this reason alone petitioners wholly failed to make out a case, let alone the fact that it was not until 1945 that they decided to press a stale claim which was saved to them only by the fortuitous circumstances of a war-time moratorium. For these reasons it is respectfully urged that there is here present no element of importance or of public interest which would warrant the granting of *certiorari*.

We now turn to the specific reasons relied upon by petitioners for the allowance of the writ, which if we read them aright, are two in number; first, that the Circuit Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this Court and, second, that the decision of the Circuit Court of Appeals is in conflict with decisions in other circuits.

II.

The Decision of the Circuit Court of Appeals Is Not in Conflict Either With Applicable Decisions of This Court or Those of Other Circuit Courts of Appeals.

In order intelligently to discuss the reasons relied upon by petitioners, it is first incumbent upon us to determine just what the decision of the Circuit Court of Appeals was. Its effect was to approve the District Court's holding as to the failure of the amended complaint to state a claim under the Sherman Act, which, of course, refers us back to the opinion of the learned District Judge. 64 F. Supp. 265. [R. 100-108.]

The holding of the District Court in this regard was twofold. It agreed with the contention of respondent "that the raising of the beets, the sale to the refineries for the purpose of processing the same into sugar is an intrastate matter and beyond the reach of the Sherman Act." [R. 102.] And in conclusion the District Judge said:

> "It appears clear that the decisions of our courts have consistently held throughout the life of the Anti-Trust Act that products of the farm which are subsequently manufactured or processed into articles of commerce are beyond the reach of said Act."

Such was the holding which was approved by the Circuit Court of Appeals. We are thus led to inquire, as to petitioners' reasons for the allowance of the writ, just what decisions of this Court or of other Circuit Courts of Appeal hold to the contrary? What decisions in the

Federal appellate jurisdiction, if any, hold that transactions with reference to local products which are subsequently manufactured into articles of commerce are subject to the Sherman Act? And, in particular, what decisions so hold where, as here, there was an utter failure to show *any* effect, let alone a substantial economic effect upon either the price or the supply of the *sugar*—the interstate commodity involved? We are frank to say that we have found none, and we gather that petitioners have found none either, for they have cited no case even remotely in point as to the question under discussion.

On the other hand, the authorities in the Federal appellate jurisdiction are legion to the effect that the purpose of the Sherman Act was to protect the consuming public—here the buyers of the sugar—from artificial tampering with the price or supply of the interstate commodity; a situation totally lacking here. We cite a few pertinent holdings:

1. The production and manufacture of goods or commodities is not commerce *within the meaning of the Sherman Act. United Mine Workers of America v. Coronado Coal Co.*, 259 U. S. 344; *United Leather Workers International Union v. Herkert and Meisel Trunk Co.*, 265 U. S. 457; *Industrial Association v. United States*, 268 U. S. 64; *Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295; *Robinson v. Suburban Brick Co.*, 4 Cir., 127 Fed. 804; *Gable v. Vonnegut Mach. Co.*, 6 Cir., 274 Fed. 66.

2. The purpose of the Sherman Act is to prevent restraints upon free competition which tend toward *market control* of a commodity passing in interstate commerce, such as monopolizing the supply, controlling the price or discriminating between its would-be *purchasers* or *con-*

sumers; there must be, in order to invoke the sanctions of the Act, some form of restrain which is so substantial as to affect *market prices* of the interstate commodity. *Apex Hosiery Co. v. Leader,* 310 U. S. 469, 490, 493, 495-501.

3. Where, as here, the activities complained of are local, and hence may not be regarded as interstate commerce, they may only be brought within the purview of the Act if they exert a substantial economic effect upon interstate commerce, as by affecting the price or by restricting the supply. *Apex Hosiery Co. v. Leader, supra; Addyston Pipe & Steel Co. v. United States,* 175 U. S. 211; *Standard Oil Co. of Indiana v. United States,* 283 U. S. 163; *Local 167 etc. v. United States,* 291 U. S. 293.

4. The principle that the production and manufacture of goods or commodities is not commerce applies as well to sugar as to any other commodity. *Utah-Idaho Sugar Co. v. Federal Trade Commission,* 8 Cir., 22 F. (2d) 122; and compare, although not in the Federal appellate jurisdiction, *Dothan Mill Co. v. Espy,* 220 Ala. 605, 127 So. 178 (alleged local combination to fix prices to be paid growers of cotton seed which was later processed into cottonseed oil, the latter being shipped in interstate commerce; held, not within the purview of the federal anti-trust laws but that defendants were amenable to the state law).

It is submitted that the holding of the Circuit Court of Appeals in the instant case is wholly in line with the principles announced in the above decisions of this Court and of the other Circuit Courts of Appeal; and hence that the twin claims of conflict in the decisions must necessarily fail.

III.

The Decisions Relied Upon by Petitioners Are Either Based Upon Regulatory Statutes in Which Congress Has, in Order to Protect Interstate Commerce, Expressly Stated Its Intention to Deal With Activities Which in Isolation Are Purely Local, or Are Distinguishable on Their Facts, or Both.

It will have been noted that petitioners, in their attempt to torture the activities complained of into a Sherman Act pattern, have largely had recourse to decisions based upon subsequently enacted regulatory statutes in which, in order to *protect* interstate commerce, Congress has explicitly declared its intention to deal with matters which in isolation are purely local.

We thus find petitioners citing decisions based upon statutes in which Congress, in the exercise of its powers under the commerce clause, dealt expressly with such subjects as:

1. Employees engaged in commerce or *in the production of goods for commerce.* (Fair Labor Standards Act, 29 U. S. C. Sec. 207.)

2. Labor disputes "affecting commerce," which latter words mean "in commerce, or *burdening* or *obstructing commerce or the free flow of commerce,* or *having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.*" (National Labor Relations Act, 29 U. S. C. Sec. (7).)

3. Food products, considered to be in commerce if "*part of that current of commerce usual in the livestock and meat-packing industries, whereby livestock, meats, meat food products, livestock products, dairy products,*

poultry, poultry products, or eggs, are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where purchase or sale is either for shipment to another State, or for slaughter of livestock within the State and the shipment outside the State of the products resulting from such slaughter." (Packers and Stockyards Act, 7 U. S. C. Sec. 183.)

4. Tobacco, transactions with reference to which are considered to be in commerce under substantially similar conditions as those expressed as to the above mentioned food products. (Tobacco Inspection Act, 7 U. S. C. Sec. 511(i).)

5. Agricultural commodities, as to which the term "affect interstate and foreign commerce" means, among other things, "in such commerce, *or to burden or obstruct such commerce or the free and orderly flow thereof, or to create or tend to create a surplus of any agricultural commodity which burdens or obstructs such commerce or the free and orderly flow thereof."* (Agricultural Adjustment Act, 7 U. S. C. Sec. 1301(4).)

As against these detailed congressional definitions we have the comparatively simple pattern of the older statutes: restraint of trade or commerce in the Sherman Act, unfair or deceptive methods of competition or practices in commerce in the Federal Trade Commission Act and the phrase "in commerce, in the course of such commerce" found in the Clayton Act. In addition to this, we have the highly significant fact that Congress has never amended the Sherman Act, despite the fact that over the years the courts have, as we have seen, consistently interpreted it as outlawing only acts *directly* affecting inter-

state commerce (the earlier concept), or at the very least having a *substantial* economic effect upon interstate commerce. *Wickard v. Filburn, supra.*

The end product of petitioners' attempt to use these later and more detailed regulatory statutes as vehicles of interpretation of such earlier and more general statutes as the Sherman Act, seems to be the claim that since, as it is said, Congress in passing the latter, "exercised all the power it possessed," every form of local activity brought within the purview of these various later enactments for the *protection* of interstate commerce in the various and sundry fields with which they deal, now *constitutes* interstate commerce *within the meaning of the Sherman Act.*

Bearing in mind that the Sherman Act is, in its more serious aspects, a penal statute, with the attendant constitutional requirement of a definite guide or standard of conduct, compare, for instance, *Cline v. Frink Dairy Co.*, 274 U. S. 445, 458, such a contention as this would seem to envisage legislation by implication with a vengeance. Fortunately, however, the decisions of this Court afford a complete answer to petitioners' contentions along this line.

In *Apex Hosiery Co. v. Leader, supra*, 310 U. S. at p. 495, it was pointed out that

> "It was in this sense of preventing restraints on commercial competition that Congress exercised 'all the power it possessed'."

And it is perfectly obvious from the balance of the opinion that the "commercial competition" to which the Court then had reference related wholly to competition in the marketing of goods or commodities passing *in interstate commerce;* and no such restraint has here been made to appear.

The case of *Federal Trade Commission v. Bunte Bros.*, 312 U. S. 349, squarely holds that the later and more detailed regulatory statutes afford no reliable guide for the interpretation of such earlier statutes as the Sherman Act, the Federal Trade Commission Act, and the Clayton Act. In that case the Federal Trade Commission issued a cease and desist order against Bunte Bros. forbidding it from selling candy in so-called "break and take" packages, on the ground that such sales, which were made wholly in Illinois, enabled it to compete unfairly with interstate competitors, who had been barred by the Commission from using this method of selling. The following quotations from the opinion affirming the order of the Circuit Court of Appeals setting aside the Commission's order illustrate the unwisdom of attempting to utilize statutes having materially different objects and standards as vehicles of interpretation of other acts:

> "While one may not end with the words of a disputed statute, one certainly begins there. 'Unfair methods of competition in commerce' are the concern of §5, and the Commission is 'directed to prevent persons . . . from using unfair methods of competition in commerce. . . .' The 'commerce' in which these methods are barred is interstate commerce. Neither ordinary English speech nor the considered language of legislation would aptly describe the sales by Bunte Brothers of its 'break and take' assortments in Illinois as 'using unfair methods of competion in [interstate] commerce.' *When in order to protect interstate commerce Congress has regulated activities which in isolation are merely local, it has normally conveyed its purpose explicitly.** See, for

*Emphasis here, as elsewhere, is added.

example, National Labor Relations Act [July 5, 1935] 49 Stat. at L. 449, 450, 453, chap. 372, §§2 (7), 9(c), 10(a), 29 U. S. C. A. §§152(7), 159(c), 160(a); Bituminous Coal Act [April 26, 1937] 50 Stat. at L. 72, 83, chap. 127, §4-A, 15 U. S. C. A. §834; Federal Employers' Liability Act [April 22, 1908] 35 Stat. at L. 65, chap. 149, §1, as amended [August 11, 1939] 53 Stat. at L. 1404, chap. 685, 45 U. S. C. A. §51" (pp. 350-351).

* * * * * * * * *

"*Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business.* The Interstate Commerce Act and the Federal Trade Commission Act are widely disparate in their historic settings, in the enterprises which they affect, in the range of control they exercise, and in the relation of these controls to the functioning of the federal system" (p. 353).

* * * * * * * * *

"* * * *This case presents the narrow question of what Congress did, not what it could do.* And we merely hold that to read 'unfair methods of competition in [interstate] commerce' as though it meant 'unfair methods of competition in any way effecting interstate commerce,' requires, in view of all the relevant considerations, *much clearer manifestation of intention than Congress has furnished*" (p. 355).

As a matter of fact, petitioners themselves, in utilizing regulatory statutes such as the Fair Labor Standards Act as the basis of their contention that the case made by petitioners falls within the scope of the Sherman Act, are running wholly counter to their own argument that decisions such as *Coe v. Errol*, 116 U. S. 517, and *Parker v. Brown*, 317 U. S. 341, 360, should be limited to situations

involving local taxation or regulation; a proposition with which we are not called upon to disagree.

As for the Sherman Act cases cited by appellants, they typify such a situation as we would have here if the price of the *sugar* had been fixed at destination; that is to say, if the price of the very commodity passing through interstate channels had been fixed by agreement. Were ours such a factual picture as those cases envisage, we would not waste the time of any court in attempting to defend it. But this has nothing whatever to do with the situation involved herein where the price of the interstate commodity was not affected at all by the activities complained of.

Specifically, the following anti-trust cases relied upon by appellants are not in point because the restraints or other activities complained of related to the interstate commodity itself, as here the *sugar*.

W. W. Montague & Co. v. Lowry, 193 U. S. 38;

United States v. Frankfort Distilleries, 324 U. S. 293;

Ethyl Gasoline Corp. v. United States, 309 U. S. 436;

Food & Grocery Bureau of Southern California v. United States, 9 Cir., 139 F. (2d) 973;

Fitch v. Kentucky Light & Power Co., 6 Cir., 138 F. (2d) 12;

United States v. Aluminum Co. of America, 148 F. (2d) 416;

United States v. Masonite Corp., 316 U. S. 265, 281;

United States v. Bausch & Lomb Optical Co., 321 U. S. 707;

C. E. Stevens Co. v. Foster & Kleiser, 311 U. S. 252;

Gibbs v. McNeeley, 9 Cir., 118 Fed. 120;

United States v. Socony-Vacuum Oil Co., 310 U. S. 150;

United States v. Southeastern Underwriters Assn., 322 U. S. 533;

Montrose Lumber Co. v. United States, 10 Cir., 124 F. (2d) 573;

White Bear Theatre Corp. v. State Theatre Corp., 8 Cir., 129 F. (2d) 600;

California Retail Grocers and Merchants Assn v. United States, 9 Cir., 139 F. (2d) 978;

Local 167 I. B. T. etc. v. United States, 291 U. S. 293, 297;

United States v. General Motors Corp., 7 Cir., 121 F. (2d) 376;

Johnson v. Joseph Schlitz, 33 Fed. Supp. 176;

Associated Press v. United States, 326 U. S. 1;

American Tobacco Co. v. United States, 328 U. S. 781;

Corn Products Refining Co. v. United States, 324 U. S. 726;

United States v. Univis Lens Co., 312 U. S. 241;

Dr. Miles Medical Co. v. John D. Park & Sons, 220 U. S. 373.

The following cases are of no aid here because grounded upon statutes in which, as we have seen, Congress provided explicitly for the regulation of matters which in

isolation are purely local (compare *Federal Trade Commission v. Bunte Bros., Inc.*, quoted *supra*):

Cases under the Fair Labor Standards Act:

Walling v. Amidon, 10 Cir., 153 Fed. 159;

Armour v. Wintock, 323 U. S. 126;

Roland Electric Co. v. Walling, 90 U. S. Adv. Op. 326;

Martino v. Michigan Window Cleaning Co., 90 U. S. Adv. Op. 386;

Borden Co. v. Borella, 325 U. S. 679;

Boutelle v. Walling, 90 U. S. Adv. Op. 520;

United States v. Darby, 312 U. S. 100;

Matee v. White Plains Publ. Co., 90 U. S. Adv. Op. 455;

Overnight Motor Transportation Co. v. Missel, 316 U. S. 572;

Hamlet Ice Co. v. Fleming, 4 Cir., 127 F. (2d) 165;

Schulte v. Gangi, 326 U. S. 712.

National Labor Relations Act:

Santa Cruz Fruit Packing Co. v. N. L. R. B., 303 U. S. 453;

N. L. R. B. v. Van de Kamp's, 9 Cir., 152 F. (2d) 818;

N. L. R. B. v. Fainblatt, 306 U. S. 601;

N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1.

Other similar statutes:

Currin v. Wallace, 306 U. S. 1 (Federal Tobacco Inspection Act);

Mulford v. Smith, 307 U. S. 38 (Agricultural Adjustment Act);

Wickard v. Filburn, 317 U. S. 111 (same);

United States v. Rock Royal Coop., Inc., 307 U. S. 533 (Agricultural Marketing Act);

United States v. Wrightwood Dairy Co., 315 U. S. 110 (same);

Stafford v. Wallace, 258 U. S. 495 (Packers and Stockyards Act).

Conclusion.

We shall take neither the time nor the space to discuss in detail the various arguments advanced by petitioners. However, a few brief comments are, we think, warranted.

Petitioners' theories as to the nature of the decision of the Circuit Court of Appeals (Petn. and Br., pp. 20-25) are wholly belied by the record. That court held, as we have earlier indicated, that the activities complained of, being local in their nature, did not come within the purview of the Sherman Act because no effect upon interstate commerce had been shown. Such holding is wholly in accord with applicable decisions of this Court and of the other circuits, as we have pointed out above.

The question of whether the entire sequence of events from the planting of the beet seeds to the appearance of the sugar upon the housewife's table constituted one inseparable transaction, as claimed, is wholly a false quantity in the case. Certainly, the courts below were entitled to take, and they did take, all of the facts into considera-

tion, *United States v. Southeastern Underwriters Assn.*, 322 U. S. 533, but their duty in this regard was at an end when they determined that no effect, let alone no *substantial economic* effect, upon interstate commerce had been shown.

It is wholly incorrect to say *in the abstract* that price fixing and price maintenance combinations are illegal *per se* under the Sherman Act. The statement is, of course, true, as to articles moving in interstate commerce, *United States v. Univis Lens Co.*, 316 U. S. 241, 251; but no such price fixing or price maintenance was here shown.

It is especially an injustice to the Circuit Court of Appeals to say that it applied the so-called "mechanical test" of direct or indirect effect upon interstate commerce, when that court was careful to point out its preference for the more accurate expression "substantial economic effect" as employed in *Wickard v. Filburn.* [R. 121.]

As for the claim that respondents "conceded" the existence of a conspiracy which damaged plaintiffs, the record is to the exact contrary. The motion to dismiss, of course, admitted such allegations as were well pleaded, *for the purposes of the motion only*, and that was all.

The claim that all that was sold to respondent by the petitioners was the *sugar content* of the beets, as distinguished from the beets themselves, is palpably an argument born of desperation and one which made its initial appearance during the course of the oral argument before the Circuit Court of Appeals.

The assertion that interstate commerce was "involved" because the price to the growers could not be determined until the sugar was sold is not only a complete *non-sequitur* as far as petitioners' claims are concerned, but it af-

firmatively demonstrates what respondent has argued throughout this entire case: that the asserted price fixing of the beets had no effect whatever upon the price of the sugar; and that to contend otherwise was to place the cart before the horse.

The complaint that the courts below stressed cases such as *Coe v. Errol*, 116 U. S. 517 and *Parker v. Brown*, 317 U. S. 371, in arriving at their respective decrees is of no moment, since the Sherman Act cases which we have earlier cited are to the same effect, as the Circuit Court of Appeals itself indicated when it declared that the citation of tax cases, while not approved, nevertheless presented no inconsistency in the decision. [R. 121.]

As for the *pari delicto* point, the same was not urged by respondent upon the appeal; nor was the question decided by the Circuit Court of Appeals. [R. 121.]

It is respectfully urged that the petition for *certiorari* should be denied.

Respectfully submitted,

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